

No. 15849 ✓

United States
Court of Appeals
for the Ninth Circuit

AMERICAN CASUALTY COMPANY OF READ-
ING, PENNSYLVANIA,

Appellant,

vs.

LEONARD F. HARMAN and RUTH V. HAR-
MAN

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LONG AND LEVIT,
BERT W. LEVIT,
 Merchants Exchange Bldg.,
 465 California St.,
 San Francisco, Calif.;

BOLTON AND GROFF,
GENE E. GROFF,
 210 West 7th Street,
 Los Angeles 14, California.

For Appellee:

LYMAN A. GARBER,
 424 So. Beverly Drive,
 Beverly Hills, California.

In the United States District Court for the Southern
District of California, Central Division

No. 249-57 Y

LEONARD F. HARMAN and RUTH V. HAR-
MAN,

Plaintiffs,

vs.

A M E R I C A N CASUALTY COMPANY OF
READING, PENNSYLVANIA,

Defendant.

FIRST AMENDED COMPLAINT DECLARA-
TORY RELIEF ESTOPPEL INJUNC-
TION

Plaintiffs complaining of Defendant allege:

For a First Cause of Action

I.

American Casualty Company of Reading, Penn-
sylvania, is a capital stock insurance company duly
licensed and qualified to write insurance in the
State of California by the Insurance Commissioner
of this State.

II.

Plaintiffs purchased a certain policy of insurance
from Defendant, bearing designation No. HOB
16557, insuring Plaintiffs under various categories,
in the face amount of \$48,500.00, for the term com-

mencing May 5, 1955, and extending to May 5, 1958, on premises known as 666 Beachcomber Road, Portuguese Bend Club, [45*] Portuguese Bend, California. Endorsed on said policy was coverage against " 'All Physical Loss' Building Endorsement" which, among other hazards, insured against and included the hazard of landslide.

III.

Plaintiffs purchased a certain policy of insurance from Defendant, bearing designation No. 04-500340, insuring Plaintiffs under various categories, in the face amount of \$23,000.00, for the term commencing July 15, 1956, and extending to July 15, 1957, with an option in the insured to renew the policy annually for 4 successive years at a premium defined in the "Annual Renewal Plan Endorsement," covering premises known as 669 Seapoint Lane, Portuguese Bend Club, Portuguese Bend, California. Endorsed on said policy was coverage under dwelling buildings, "All Physical Loss" Form, which included the hazard of landslide.

IV.

Many other coverages were included in both of the aforesaid policies, including coverage against the hazard of fire.

V.

Neither party knew at the time of the writing of the aforesaid policies, of any unstable condition of the ground upon which the residences were built,

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

which constituted any special or extraordinary hazard.

VI.

In the month of October, 1956, certain evidences of landslide were noticeable on premises at 666 Beachcomber Road. Defendant was notified thereof and caused inspections to be made in October and December, 1956. The damage was part and parcel of a massive land movement several square miles in area, affecting the hillside, beach and the beach under the ocean in the vicinity of the Portuguese Bend Club. On January 21st a report in writing was made on damage from landslide on premises at 669 Seapoint [46] Lane. On January 22, 1957, a written memorandum of the landslide affecting 666 Beachcomber Road was made. No substantial repair work has been undertaken on either of the premises, because of the uncertainty as to the eventual extent of the damage and the proper steps to be taken.

VII.

The massive landslide referred to commenced in the Fall of 1956, and manifestations of it are occurring daily in the Portuguese Bend area, including the premises above referred to. Plaintiffs are informed and believe, and on such information and belief, allege that the movement will continue until the insured premises have become totally untenable. Each of the manifestations and evidences of the landslide is a part of the same casualty, event and hazard.

VIII.

Defendant knows that a destructive landslide has commenced; is still progressing, and will probably continue for a substantial period in the future.

IX.

Plaintiffs are informed and believe, and on such information and belief, allege that the landslide casualty will continue until the buildings on the aforesaid premises are destroyed and made uninhabitable and will be total losses.

X.

Under date of January 29, 1957, Defendant mailed notices of cancellation of the aforesaid policies to the Plaintiffs individually, that such cancellation becomes effective on February 4, 1957, at 12 o'clock noon.

XI.

On February 4, 1957, at eight thirty-five (8:35 a.m.) o'clock in the forenoon, the within suit was commenced by the filing of the Complaint with the Clerk of the Superior Court of [47] the State of California, in and for the County of Los Angeles, which is a court of competent jurisdiction; and that Summons of that court was thereupon issued on the said Complaint.

XII.

The cancellation notices aforesaid are an attempt to remove the coverage of insurance against landslide after the inception of the hazard and during

the continuity of a hazard insured against under the policy contracts.

XIII.

Plaintiffs are informed and believe, and on such information and belief, allege that insurance against all hazards included in the policies have now become unavailable under universal insurance underwriting practices. Plaintiffs have canvassed insurance officers and carriers extensively and have been unable to obtain insurance against fire or any other hazards. The aforesaid canvass was made specifically excluding landslide. Plaintiffs are informed and believe that if an insurer could be found to underwrite fire insurance on the said premises, that in the event of a loss by fire, the new insurance would be subject to proration to the insurance coverage afforded by the policies hereinabove referred to.

XIV.

Plaintiffs are informed and believe, and on such information and belief, allege that many insurance companies carrying comparable risks and coverage in the Portuguese Bend area are treating their insurance coverage as being a continued responsibility of the insurer.

XV.

The landslide is the proximate and efficient producing cause of the inability of Plaintiffs to obtain other insurance against casualties exclusive of landslide from other insurance carriers, and it is a loss or detriment resulting from the casualty [48] or event of the landslide.

XVI.

An actual controversy exists between Plaintiffs and Defendant relating to the legal rights and duties of the respective parties, in that Plaintiffs are interested under the insurance policies and contracts referred to herein, and Plaintiffs desire a declaration of their rights and duties with respect to Defendant and in, to, over and upon the said insurance policies and contracts, including a determination of the construction and validity of the said policies and contracts and the relevant provisions thereof.

XVII.

The controversy between the parties is as follows:

A.

(1) Plaintiffs claim that a total loss on premises has been constructively suffered during the term of the policy contracts; that the face amount of the insurance upon the buildings is now due and owing; and that the procedural steps and devices prescribed by the policies have been waived by the service of the said notices of cancellation.

(2) Defendant claims that the only loss payable under the policies and the continuing destructive forces herein alleged, is the damage resulting to the date of the proposed cancellation of the policies and that the Defendant will have no liability for damage from the landslide continuing past the stated date of cancellation.

B.

(1) Plaintiffs claim that the onset of the hazard of landslide is indivisibly related to other hazards insured against under the policies and that the Defendant's liability under the other hazards cannot be severed from its liability for all physical loss resulting during the progress of [49] the hazard or event of landslide.

(2) Defendant claims that the hazards insured against are severable from landslide and that if the Defendant has a continuing liability for landslide it can, in the interim, effectively cancel its liability for other hazards.

C.

(1) Defendant claims that it can cancel its insurance coverage after the start of a hazard insured against and before the hostile force or event has run its full course.

(2) Plaintiffs claim that after the known onset of the hostile force of landslide, the Defendant cannot stop its liability until the termination of the event.

D.

(1) Defendant claims that the contract provision for cancellation of the policies on five days' notice applies in any circumstances, regardless of the onset of a continuing casualty event.

(2) Plaintiffs claim that the status quo of the insurance coverage attaches and remains from the start of a casualty event insured against and con-

tinues until the destructive hostile force has ceased to act.

E.

(1) Defendant claims in the premises that it can cancel its liabilities, except as to landslide, on five days' notice.

(2) Plaintiffs claim that on the advent of, or there coming into being, or there becoming detectable a hostile or destructive force which is one of the hazards insured against; and the event being such as to render the Plaintiffs' property uninsurable against other hazards covered by the [50] policy contracts, the policies are not in any respect or part cancellable.

F.

(1) Plaintiffs claim that in the premises Defendant is estopped to claim a right to cancel the insurance coverages.

(2) Defendant claims that it, in accepting the proffered insurance risks; issuing its policy contract thereon; continuing for month after month its insurance coverage with earned premiums accruing thereon day by day during the period when the insurance risks were on a par with tens of thousands of comparable risks throughout the United States; its failure to inform Plaintiffs, during the time that they could easily have replaced the insurance coverages with policies of other underwriters, of Defendant's intent or disposition to afford less than the full protection that the Plaintiffs sought; and its attempted cancellation of its duly issued policies after

the Defendant underwriter learned of the operation of a hostile destructive force against the insured premises—does not create a situation estopping it from cancelling or claiming to cancel its policies.

G.

(1) Defendant claims it can cancel its policies under any circumstances on five days' notice.

(2) Plaintiffs claim that the right of an insurer, pursuant to statute and pursuant to insurance contracts issued and issuable only pursuant to statute, to cancel and terminate its insurance policies prior to the running of the full term of the contracts, is suspended when suit is [51] instituted and pending between the parties at the time the intended cancellation is to occur.

H.

(1) Defendant claims that its liabilities under the policies terminates upon the expiration dates of the policies.

(2) Plaintiffs claim that upon the stated termination dates of the respective policies, if the event of landslide be then continuing, the insurance coverage will remain in force and effect.

For a Second Cause of Action

XVIII.

Plaintiffs repeat and reallege Paragraphs I through XVII of their First Cause of Action with the same force and effect as if set forth herein at length.

XIX.

In the premises Defendant is estopped to assert cancellation of the policies, or any right to cancel the policies.

For a Third Cause of Action

XX.

Plaintiffs repeat and reallege Paragraphs I through XVII and Paragraph XIX with the same force and effect as if set forth herein at length.

XXI.

Plaintiffs have great property values at stake herein; are confronted with the making of vital decisions relative to preservation, transfer and salvage of their property; in the premises will be confronted with substantial questions of obtaining credit or of marshalling funds for to implement decisions as aforesaid.

XXII.

In the premises Defendant should be permanently enjoined from claiming cancellation of the policies by the notices described [52] in Paragraph X of this pleading, and from ever asserting cancellation thereby; should be enjoined from serving any other notice or notices of cancellation, from claiming cancellation of the policies or either of them or any parts of them, and from attempting in any manner to do or accomplish such things until the first of the following shall occur: (1) Defendant shall have performed everything necessary and proper for it to do

under the policy contracts, as witnessed (a) by the written statement of Plaintiffs, or (b) by further order of the court; (2) the landslide shall have stabilized and the Defendant shall have made payment for all damage occurring under the policies for losses under any of the risks insured against, as witnessed (a) by the written statement of the Plaintiffs, or (b) by finding and further order of the court.

Wherefore, Plaintiffs pray that this court declare its judgment:

1. That Plaintiffs recover \$58,000.00 for damages to buildings, contents and additional living expense occasioned thereby.

2. That the said insurance policies are in full force and effect as to all hazards, from the inception of the landslide until the cessation of the hostile destructive forces.

3. That Defendant is estopped to question the validity of the said insurance policies, and the protection of the Plaintiffs thereunder; and to assert or claim any cancellation or termination thereof whatsoever.

4. That Defendant be enjoined from certain acts, pursuant to the prayer of Paragraph XXII.

5. That Plaintiffs recover their costs of suit.

6. That Plaintiffs have further and different relief as it may appear just and equitable to [53] the court.

Dated: March 4, 1957.

/s/ LYMAN A. GARBER,
Attorney for Plaintiffs.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed March 6, 1957. [54]

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED COMPLAINT

Comes now the defendant for answer to plaintiffs' complaint, alleges:

I.

As to the allegations of paragraph VII, this defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that the movement will continue until the insured premises have become totally untenable.

II.

As to the allegations of paragraph VIII, this defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that the landslide will probably continue for a substantial period in the future.

III.

As to the allegations of paragraph IX, this defendant is without knowledge or information suffi-

cient to form a belief as to [107] truth of the averments of said paragraph.

IV.

As to the allegations of paragraph XI, this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments pertaining to the date and time of filing the alleged complaint.

V.

As to the allegations of paragraph XII, this defendant denies each and every allegation, thing and matter contained in said paragraph, except that this defendant admits that said cancellation notices were duly given pursuant to the terms of the alleged policies and were legally effective pursuant thereto.

VI.

As to allegations of paragraph XIII, this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph.

VII.

As to allegations of paragraph XIV, this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph.

VIII.

As to allegations of paragraph XV, this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph.

IX.

As to the allegations of paragraphs XVI and XVII, this defendant denies that there exists between the plaintiffs and defendant any legal controversy in that and by reason of the fact that the policies pleaded in the plaintiffs' complaint were duly, effectually and legally cancelled as of February 4, 1957. [108]

Further Pleading and for Answer to Plaintiffs' Second Cause of Action, This Defendant Alleges:

I.

As to the allegations of paragraph XVIII, whereby and wherein paragraphs I through XVII of plaintiffs' first cause of action is incorporated, the defendant refers to its answers to said paragraphs and by this reference incorporates said answers as though fully set forth herein.

II.

As to the allegations of paragraph XIX, this defendant denies each and every allegation, thing and matter contained in said paragraph.

Further Pleading and for Answer to Plaintiffs' Third Cause of Action, This Defendant Alleges:

I.

As to the allegations of paragraph XX, whereby and wherein paragraphs I through XVII of plaintiffs' first cause of action is incorporated, the de-

defendant refers to its answers to said paragraphs and by this reference incorporates said answers as though fully set forth herein.

II.

As to the allegations of paragraph XXI, this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph.

III.

As to the allegations of paragraph XXII, this defendant denies each and every allegation, thing and matter contained in said paragraph.

Further Pleading for Defense to Plaintiffs' Complaint and Each of the Causes of Action Therein, This Defendant Alleges:

I.

That each of the policies pleaded in the plaintiffs' complaint [109] were written pursuant to and incorporated the terms and conditions of the California Statutory Fire Insurance Policy.

II.

That the said policies provided in part as follows:

"Cancellation of policy. This policy shall be canceled at any time at the request of the insured, in which case this company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the

expired time. This policy may be canceled at any time by this company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered), will be refunded on demand."

III.

That the defendant duly gave notice pursuant to the aforesaid terms and conditions of the pleaded policies and that cancellation of said policies thereby became effective February 4, 1957, at 12:00 o'clock noon.

Wherefore this defendant prays judgment that:

(1) It be decreed that the policies pleaded in the plaintiffs' complaint were duly cancelled February 4, 1957;

(2) The plaintiffs take nothing by their complaint;

(3) The defendant have and recover its costs and disbursements herein; [110]

(4) For such other relief as is just in the premises.

BOLTON AND GROFF,

By /s/ GENE E. GROFF,

Attorneys for Defendant.

[Endorsed]: Filed April 19, 1957. [111]

[Title of District Court and Cause.]

STIPULATION BY PLAINTIFFS
RE ISSUES FOR TRIAL

Stipulation by Plaintiffs Relative to Trial of the
Within Causes of Action on or About June
11, 1957.

This Stipulation is predicated on the following
facts:

(1) At the time of filing the Complaint herein
Plaintiffs had:

(a) No knowledge of the date upon which trial
of these causes of action would be had; nor

(b) Knowledge of how great the damage to the
premises would be at the time of trial, which dam-
age, quite conceivably could then have been total;

(2) Damage has been great to the property in-
sured;

(3) Damage to the premises is not total at this
time;

(4) The landslide is still continuing and it is
impractical to determine the extent, nature, or cost
of the engineering work and building which need to
be done, or even to ascertain whether or not it is
practical to effect repair of the premises; and [114]

(5) It is a matter of vital importance to Plain-
tiffs to obtain a binding declaration of the Court
as to whether or not the purported cancellation of
the said insurance policies is effective or is a nullity.

In the Premises Plaintiffs Stipulate for the Purposes of Trial on or about June 11, 1957:

Plaintiffs are making no claim that at this time a total loss on the premises has been suffered; and are not seeking at this time any monetary adjudication of the amount of the damages suffered by Plaintiffs on the insured properties. This stipulation is not a waiver of any damages suffered by Plaintiffs before or after the date of Trial, and Plaintiffs expressly reserve the right at any proper future time and at any proper forum, including this Court and this cause of action, to claim and prove any and all damages suffered by them on the insured properties.

Dated June 10, 1957.

/s/ LYMAN A. GARBER,
Attorney for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed June 11, 1957. [115]

[Title of District Court and Cause.]

STIPULATION TO VACATE
SUBMISSION FOR OFFER OF PROOF

ORDER

It is hereby stipulated by the attorneys for the respective parties that the following order may be made, if it please the Court:

Order

I.

It is hereby ordered that the Order of Submission of the within causes of action, which was made June 11, 1957, after trial, be and hereby is vacated;

II.

It is hereby ordered that the causes will be reopened for further trial;

III.

It is hereby ordered that it be deemed that plaintiff makes the following offer of proof after objection was sustained [122] at the trial to the following question:

(Reporter's Transcript of Proceedings page 19, lines 14 to 17:)

By Mr. Garber: "Col. Harman, have you made any attempt to obtain fire insurance on your property from other insurance carriers?"

The offer of proof is as follows:

By Mr. Garber: "May it please the Court, the plaintiffs make the following offer of proof in support of the allegation of paragraphs XIII and XV of their First Amended Complaint.

"That if permitted to do so, Plaintiff Leonard F. Harman would testify that before February 4, 1957, and before the filing of the within cause of action, he went to the nearby city of San Pedro, California; that on one of the main business streets

of that city he went into an office which was clearly marked as the office of a local agent for the writing of insurance; that he stated to a person in charge that he wished to purchase fire insurance upon two houses that he owned; that he was informed by said person that they would not write fire insurance upon properties in the landslide area at Portuguese Bend; that he then went to another office on one of the main business streets of the city clearly marked as the office of a local agent in the insurance business; that he stated that he wished to buy fire insurance on the houses [123] referred to herein; that the person in charge there said that he could not write policies on houses located in the landslide area at Portuguese Bend; that he asked such person if insurance could not be obtained from Lloyds of London and was told by such person that fire insurance could not be available upon the said houses through Lloyds of London.”

IV.

It is hereby ordered that it be deemed that defendant objects to the adducing of evidence pursuant to the foregoing offer of proof.

V.

It is hereby ordered that it be deemed that the Court rejects said offer of proof and sustains the objection thereto.

VI.

It is hereby ordered that causes now stand re-submitted on the record as augmented by the

aforesaid and that the parties have until July 19, 1957, to file simultaneous briefs.

Dated: August 9, 1957.

/s/ BEN HARRISON,
Judge United States District
Court.

It is stipulated that the above Order may be made.

/s/ LYMAN A. GARBER,
Attorney for Plaintiffs.

BOLTON & GROFF,

By /s/ JAMES E. GROFF,
Attorneys for Defendant.

[Endorsed]: Filed August 9, 1957. [124]

[Title of District Court and Cause.]

OPINION

Harrison, Judge.

In this diversity action for declaratory relief, the plaintiffs seek to forestall a cancellation of two insurance policies covering two family structures located at 666 Beachcombers Road and 669 Sea Point Lane, located in the area known as Portuguese Bend Club, Portuguese Bend, California. This area is southerly of Los Angeles and westerly of the City of San Pedro.

The defendant issued fire insurance policies on the above-mentioned structures and included in said policies a provision insuring, among other risks, said premises against "All Physical Loss."

Both policies were in effect during the fall of 1956, when a massive and continuing land movement commenced in the Portuguese Bend area, affecting a large number of properties, including the two aforementioned. Damage was first noted by the insured in October, 1956. The company inspected the properties in November and December of 1956, and again in January, 1957. Damage was substantial and continuous. By January 26, 1957, the damages were estimated by the company at over \$4,500 to 666 Beachcombers Road, and about \$2000.00 on Sea Point Lane. On January 20, 1957, with full knowledge of the existing land movement, the company issued notices of cancellation of both policies, effective January 4, 1957, attempting to comply with Sections 650 and 2071 of the Insurance Code of California. (West's Annotated Calif. Codes.)

However, said notices of cancellation would not terminate liability where a continuing loss had already commenced, until the loss by damage had been complete or the cause of the loss had ceased. 29 Am. Jur. 261; 32 Corpus Juris 1246 (see cases cited thereunder); *Globe & Rutgers Fire Insurance Company v. David Moffat Co.*, 154 Fed. 13. Nor would the expiration of the policy affect the liability of the defendant [130] where the damages continue incessantly. *Pruitt v. Hardware Dealers Mutual*

Fire Ins. Co., 112 F. 2d 140. Nor would an event which would ordinarily terminate the policy abrogate the coverage after the loss insured against commences. *Davis v. Conn. Fire Ins. Co.*, 158 Cal. 766; see also 1 L.R.A. (N.S.) 364-9.

In *Home Insurance Co. v. Heck*, 65 Ill. 111, 116 (1872), the Supreme Court of Illinois held:

“[I]f there was an impending fire from a quarter different from the one which first caused apprehension, the insurer would have no right to cancel the policy. It would be an act done in the face of a threatened and approaching danger, and which the insurers were not competent to do. Such a right would render policies of insurance valueless.”

While in Illinois there was mere impending danger, in the case at bar, actual and substantial damage had occurred.

A contract of insurance is an agreement to indemnify the insured against loss from contingencies which may or may not occur. When the contingency arises, then and only then does the liability of the insurer become a contractual obligation. *Holland v. Caledonian Ins. Co.*, 149 Fed. Supp. 476; 9 Words & Phrases 109. There then remains no “risk” which could be the subject matter of insurance. The contingency having occurred, there is nothing the insurer can unilaterally do to alter the policy with respect to a loss that is already in being. All that

remains is the determination of the extent of the damage.

“It is well settled that ‘the cancellation of an insurance policy does not affect rights which have already accrued under the policy in favor of the insured or of a third person * * *’. (29 Am. Jur. 261).” *Insurance Co. of N.A. v. U.S.*, 159 F. 2d 699, 701. [131]

The defendant in argument and in its brief recognizes its liability for slippage until the total destruction of the property, or until the present movement ceases and the land again becomes stable, but contends that other risks assumed by the defendant ended upon the notice of cancellation.

With this we cannot agree. It is easily understood why the defendant desires to escape the risk of fire. The hazards of fire are greatly increased by the earth movement and fire protection under the present conditions is at a minimum in the area affected.

The premiums being entire, these contracts of insurance are indivisible, and counsel for defendant so recognizes. (See also *C.J.S.* 788; *Goorberg v. Western Assur. Co.*, 150 Cal. 510, *United States v. Bethlehem Steel Corp.*, 315 U.S., 289, 298.)

In this case we must remember that the inclusion of “All Physical Loss” provisions in residential fire insurance policies is of recent origin and as a result the case law is very limited. (See “*Western Underwriter*,” April, 1957, page 40.) This court has been faced with the problem of determining the law

without much aid from precedents. The court has endeavored to resolve doubts and ambiguities in the interpretation and construction of the policies in favor of the insured (Calif. Civil Code § 1654; *Raulet v. Northwestern Nat. Ins. Co.*, 157 Cal. 213), and thus prevent the insurer from taking an unjust and unfair advantage of the insured and weaken the purpose for which the policies were issued.

To permit revocation while the contingency insured against is occurring would be to sanction the commission of fraud upon the insured. This court should not be a party to such conduct. [132]

I am therefore of the opinion that the plaintiffs are entitled to a judgment declaring said policies to be in effect until the earth movement has become stabilized, or until the subject matter of the policies has been completely destroyed. The plaintiffs, being given the full continuing protection of the policies, must also continue the burdens imposed thereunder, and continue the payment of premiums. If plaintiffs elect to terminate the said premium payment, the policy shall only cover earth-slide damage.

Counsel for plaintiffs is directed to submit to me, under the rules of this court, proposed findings and decree.

Dated: This 18th day of October, 1957.

/s/ BEN HARRISON,

Judge.

[Endorsed]: Filed October 18, 1957. [133]

In the United States District Court for the
Southern District of California, Central Division

No. 249-57—BH

LEONARD F. HARMAN and RUTH V. HAR-
MAN,

Plaintiffs,

vs.

AMERICAN CASUALTY COMPANY OF
READING, PENNSYLVANIA,

Defendant.

Findings of Fact, Conclusions of Law and Declar-
atory Judgment

The within cause having duly come on for trial on July 11, 1957, in the above-entitled court, the Honorable Ben Harrison, Judge, Presiding, and Lyman A. Garber, Esq., appearing as attorney for plaintiffs, Bolton & Groff, by Gene E. Groff, Esq., appearing as attorneys for the defendant, and evidence, both oral and documentary, having been introduced, and the matter having been submitted.

The Court makes the following written Findings of Fact and Conclusions of Law and Judgment Declaration:

Findings of Fact

I.

The plaintiffs commenced the above action in the Superior Court of the State of California in and for the County of Los Angeles. [134]

II.

The Complaint states a controversy wholly between citizens of different states, to wit: between plaintiffs, both citizens and residents of the State of California, and the defendant, American Casualty Company of Reading, Pennsylvania, a citizen and resident of the State of Pennsylvania.

III.

The amount in controversy between the plaintiffs and the defendant exceeds, exclusive of interest and costs, the sum of \$3,000.00.

IV.

The defendant duly caused the matter to be removed from the Superior Court of the State of California in and for the County of Los Angeles to the United States District Court, Southern District of California, Central Division.

V.

The defendant issued two policies of insurance, No. HOB16557 and No. 04-500340, to the plaintiffs covering, subject to the terms and conditions of said policies, residential property respectively located at 666 Beachcomber Road, Portuguese Bend Club, Portuguese Bend, Los Angeles County, California, and 669 Seapoint Lane, Portuguese Bend Club, Portuguese Bend, Los Angeles County, California.

VI.

Each of the aforesaid policies were issued on California Standard Form Statutory Fire Insurance Policy and endorsed to cover "All Physical Loss."

VII.

That each of the aforesaid policies provided as follows: "Cancellation of Policy. This policy shall be cancelled at any time at the request of the insured, in which case this company shall, upon demand and surrender of this [135] policy, refund the excess of paid premiums above the customary short rates for the expired time. This policy may be cancelled at any time by this company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand."

VIII.

The defendant on January 29, 1957, mailed notices of cancellation of each of the above policies stating that the policies would be cancelled February 4, 1957, at 12:00 o'clock noon. Said notices of cancellation were given in accordance with the terms of the policies and counsel so stipulated.

IX.

For several months prior to January 29, 1957, defendant had been aware of the fact that a massive landslide was occurring in the Portuguese Bend Club area of Los Angeles County, that the properties insured under the said policies were in the said landslide area and were suffering progressive

damage therefrom, and that the landslide was still in progress at the time of the mailing of the notices of cancellation.

X.

The risk of damage to the insured property by landslide was one of the hazards insured against under the said policies.

XI.

Monetary adjudication of the amount of damages under the policies was not sought at the trial. Plaintiff stipulated that damages were not total at that time but were substantial, and damage was continuing. Defendant admitted damages estimated at \$4,500.00 to 666 Beachcomber Road, and \$2,000.00 to 669 Sea Point Lane as of January 26, 1957. Defendant stipulated that the [136] landslide was continuing as of the date of trial. ✕

XII.

Until and unless there is complete destruction of the insured property by landslide, the plaintiffs have substantial property values in the said insured properties subject to risk of destruction by hazards, other than landslide, which are within the scope and the purview of the coverages of said policy contracts.

XIII.

Plaintiffs made an offer of proof of the inability, due to the landslide, of plaintiffs to obtain insurance in the normal insurance markets against hazards, other than landslide, on the properties covered by

the aforesaid policies. Defendant duly objected to the introduction of the evidence referred to. The Court sustained the objection on the grounds ~~that the policy contract was not severable,~~ and that the evidence was incompetent, irrelevant and immaterial.

XIV.

The premiums charged on the respective policies were based upon and stated in said policies on the basis of all hazards insured against, and the premiums stated were not allocated to specific hazards.

XV.

The purported cancellations of the insurance policies was not timely inasmuch as the properties insured, at the time of the service of notices of cancellation, had been materially damaged by the landslide and were patently further endangered by active landslide still in progress.

XVI.

Liability of defendant from past, and from future damage caused by the landslide until the movement stabilizes, is not subject to the condition of plaintiffs paying premiums for periods after the inception of the landslide. [137]

XVII.

The right of the plaintiffs to continued insurance coverage under the said policies against hazards other than landslide is properly subject to their

making timely payment, or tender of premium for periods following that in which the landslide had its inception. The amount of premium payable for each such period is the amount stated in the policies for the period in which the landslide had its inception.

XVIII.

Premiums for the policy periods immediately succeeding the period in which the landslide had its inception have been duly tendered by plaintiffs to defendant, and have been refused. [138]

Conclusions of Law

I.

Plaintiffs should have a binding declaration of Court:

II.

That the said insurance policies are not cancellable while a hostile destructive force insured against, and clearly evident and known to defendant, is operating against the properties; nor while known hostile destructive forces within the limits of hazards insured against are existing or imminent.

III.

That the notices of cancellations are of no force and effect.

IV.

That the respective hazards insured against under the policy contracts are not severable, and the contracts are entire.

V.

That the service of the notices of cancellation were not timely and were not given until the defendant had notice of the occurring landslide condition.

VI.

That no further premiums are due from plaintiff to continue insurance coverage against landslide up to the time that the land stabilizes.

VII.

That timely payment, or tender of premiums for periods subsequent to that in which the landslide took its inception shall be a condition precedent to continuing insurance coverage against hazards other than landslide; that premiums due shall be in the amount charged for the period in which the landslide had its inception; and, conditioned upon said payment or tender of premiums, coverage against hazards other than landslide, shall continue until the landslide stabilizes and shall not terminate on the stated expiration dates of said policies. [139]

VIII.

That the defendant be enjoined from attempting to cancel, claiming to cancel and serving notice of cancellation under the policies, except for failure to tender premiums as herein provided, until further order of the Court; or upon stipulation or written consent of plaintiffs.

IX.

~~That the Court should retain jurisdiction in this case for a determination of any matters of controversy under the policies.~~

X.

That plaintiffs should recover their costs of suit.

DECLARATORY JUDGMENT

In accordance with the foregoing Findings of Fact and Conslusions of Law, it is Ordered, Adjudged and Decreed:

1. The notices of cancellation of insurance policies issued by defendant and designated, respectively, No. HOB 16557 and No. 04-500340, mailed on or about January 29, 1957, and stated to be effective February 4, 1957, at 12:00 o'clock Noon, are null and void.

2. The aforesaid insurance policies are in full force and effect and will remain so until the first of the following events shall occur:

(a) It shall be determined by further order of the Court that the landslide at Portuguese Bend on the Palos Verdes Peninsula, County of Los Angeles, State of California, which commenced in the fall of 1956, and has been continuously in progress up to the present time, shall stabilize; and any other insured hazards which had their inception before the permissible termination of the insurance coverage, as above defined, shall have terminated, or

(b) The defendant shall have extinguished, by payment to the plaintiffs, all of the insurance coverage assumed by defendant under the said policies, or either of them, or

(c) The plaintiffs shall give a satisfaction of judgment to defendant, or stipulate in writing to the fact that defendant's duties and liabilities under said policies, or either of them, have been fully met and performed.

3. With respect to hazards, other than landslide, which were assumed by the defendant under the said policies it shall be a condition of future insurance coverage for policy periods after those which included October 1, 1956, that the plaintiffs pay or tender to defendant premiums in the amount established by the policies [141] for the period which included October 1, 1956, for every successive period;

(a) Tender of such premiums for the current installment periods has heretofore been made by plaintiffs and refused by defendant;

(b) It is a condition of continuation of insurance coverage under said policies for hazards other than landslide that said premiums shall be re-tendered to defendant by plaintiffs within 30 days after the entry of this Declaratory Judgment;

(c) If tender be refused by defendant, plaintiffs may within 60 days after entry of this Declaratory Judgment, if they be so advised, pay the principal amount of such premiums to the Clerk of

this Court, subject to withdrawal on demand by defendant, or refundable to plaintiffs on further order of the Court, and such payment to the Clerk shall be a valid tender of premium due; no interest shall be required;

(d) Future annual installments will be due on the anniversaries of the month and day established by the policy contracts, and if tender be not accepted by defendant, may, if the plaintiffs be so advised, be deposited with the Clerk of this Court within thirty days of such due dates under the provisions aforesaid; and shall be valid tender to keep the policies in effect as to all hazards covered therein;

(e) Coverage against hazards other than landslide may be continued by payment or tender of premiums in the amount and at the times aforesaid until the landslide stabilizes irrespective of the stated expiration dates of the respective policies, except as the policies may terminate as provided in "2" above.

(f) If payment or tender of successive premiums be not made as provided in this section "3," defendant may serve notices of cancellation on plaintiffs as to insurance coverage [142] against all hazards except landslide;

(g) Liability of defendant for all damage caused by said landslide so long as it continues has heretofore been fixed and established by the occurrence of landslide and shall not be subject to the

condition of premium being paid or tendered as aforesaid.

4. Defendant is enjoined from cancelling, claiming to cancel, or serving Notice of Cancellation of its policies HOB 16557 and 03-500340, or both, except as herein provided and permitted.

5. After the occurrence of any of the events defined above in "2" the policies may be cancelled.

6. ~~The Court shall retain the jurisdiction of this matter until final adjustment of the rights and duties of the parties.~~

7. ~~In the adjustment of any rights and duties of the parties, the parties may seek adjudication thereof by further proceedings in the within cause of action.~~

8. Plaintiffs shall have judgment against defendant for their costs of suit herein in the sum of \$67.35 (Taxed, no obj.).

Dated: November 14, 1957.

/s/ BEN HARRISON,

United States District Court
Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed and entered November 14, 1957. [143]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that American Casualty Company of Reading, Pennsylvania, Defendant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 14, 1957.

Dated: December 12, 1957.

BOLTON AND GROFF,

By /s/ GENE E. GROFF,

Attorney for Defendant and Appellant, American Casualty Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 12, 1957. [145]

In the United States District Court, Southern
District of California, Central Division

No. 249-57-Y Civil

LEONARD F. HARMAN and RUTH V. HAR-
MAN,

Plaintiffs,

vs.

AMERICAN CASUALTY COMPANY OF READ-
ING, PENNSYLVANIA,

Defendant.

Honorable Ben Harrison, Judge Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances:

For the Plaintiffs:

LYMAN A. GARBER, ESQ.

For the Defendant:

BOLTON AND GROFF,

GENE E. GROFF, ESQ.

Tuesday, June 11, 1957; 2:00 P.M.

The Clerk: Case No. 249-57-Y, Leonard F. Har-
man and Ruth V. Harman v. American Casualty
Company of Reading, Pennsylvania, for trial.

Mr. Garber: Ready.

Mr. Groff: The defendant is ready, your Honor.

The Court: What facts are you gentlemen prepared to stipulate to?

Mr. Garber: I believe, if it please the Court, there is not very much in dispute on the facts in this matter.

These are two insurance policies, all physical risk, which were issued some two years to a year and a half ago respectively—I may be a little wrong on that—before the situation arose of a landslide in the Palos Verdes area in the Portuguese Bend section of the Palos Verdes Peninsula.

Notice of that was given to the company and I believe is acknowledged by the pleadings. They had full knowledge of the fact of the landslide and of damage as to the degree occurring and to a continuance of the slide, which I guess could be stipulated to is continuing to the present time.

Then we have stipulated that there was service of a 5-day notice of cancellation under each of the policies which were mailed on or about January 29, 1957, and stated to be effective as of February 4, 1957. [4*]

One thing more, your Honor—I have prepared here an instrument which I have labeled “Stipulation of Plaintiffs,” relative to the trial of the case.

The Court: I might say that I have not had a chance to study the file or the points and authorities that were filed in the motion for summary judgment, and which I believe was withdrawn by one of the parties at least.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Garber: Your Honor, I believe both sides filed motions and both were denied by Judge Yankwich.

But I think the points and authorities which were filed with those motions would be considered by both parties to be substantially their points and authorities.

The Court: Is not the real issue here as to whether or not cancellation of the policy can be obtained when there is imminent danger?

At the time of the cancellation of the policy, was there any damage to the property?

Mr. Groff: There was, your Honor.

Your Honor, I don't know whether you took my silence as to counsel's statement of a stipulation as being my agreement to the stipulation. I would like to restate what I am willing to stipulate to, if I may.

The Court: You may.

Mr. Groff: And that is, that the policies may go into evidence and they will speak for themselves; [5]

That they were duly executed, they were executed by the companies and premiums were paid for them;

That we received due notice of loss and that an earth movement occurred in the area.

The Court: I think most of us will take almost judicial notice about the trouble that they have been having down at Portuguese Bend.

Mr. Groff: And that that earth movement has continued up to this time.

Beyond that I can think of nothing at the present time that we are willing to stipulate to.

The Court: Can you stipulate as to what extent—not in dollars and cents but as to what extent—the earth movement has affected the premises involved here?

Mr. Groff: I think counsel properly labeled this document as a stipulation on his part, or an agreement of facts on his part. We acknowledged receipt of it, but it wasn't a mutual stipulation between the parties.

We do not know, your Honor, at this time I don't know—I have some idea as to what it was at the date of cancellation—but at the date of cancellation, if I may use that expression with the Court, on the one building there was approximately \$2,000 worth of damage, and on the other building I will have to be a little bit broader, it was somewhere between \$4,500 and maybe \$6,000 worth of damage. That is as of [6] February 4, 1957.

The Court: Then the houses had been partially damaged at the time of notice of cancellation?

Mr. Groff: I will so state.

The Court: Both houses?

Mr. Groff: Yes. I will so state here in Court.

The Court: As I understand, the notice of cancellation was given after this damage had occurred.

Mr. Groff: After there had been notice that there was damage to the building; that is correct, your Honor.

The Court: I think the policies are the first

things that should be introduced in evidence. Who has them?

Mr. Groff: May I make one more statement?

The Court: Yes.

Mr. Groff: I believe that if there is to be any issue I want to put proof on, but I believe the pleadings admit the receipt of the cancellation notice.

The Court: He made a statement that the notice of cancellation was received and mentioned the date it was received.

Mr. Groff: I misunderstood him, then. I thought he said they were mailed and stated to be effective.

The Court: You said he received it and that it became effective, I think, February 4th, did you not?

Mr. Garber: I think I said, your Honor, that they were stated to be effective February 4th. [7]

Shouldn't the policies be introduced and also the notice of cancellation?

Mr. Groff: The pleadings admit the cancellation.

The Court: I know, but should I not have that before me?

Mr. Groff: I don't have them. The plaintiff has them.

Mr. Garber: Would you care to examine these, counsel?

Mr. Groff: Yes.

(Counsel examining documents.)

The Court: The stipulation filed with the Court, of course, is only the plaintiff's stipulation.

Mr. Garber: That is correct, your Honor.

The Court: May I ask, is there any dispute of this fact—it says, “This stipulation is predicated upon the following facts”—at the time of the filing of the complaint, plaintiff’s had no knowledge of the date upon which the trial of these causes of action would be had. Knowledge of how great the damage to the premises would be at the time of trial quite conceivably could not then have been totaled.

There cannot be much argument about that, can there, counsel?

Mr. Groff: Concerning that, I would say there could be no question.

The Court: You have already made a statement as to the amount, generally speaking, of damages. Was the damage done to the houses? [8]

Mr. Groff: To the houses.

The Court: And that the damage to the premises is not totaled at this time?

Mr. Groff: I will agree to that, your Honor.

The Court: Would you stipulate the landslide is still continuing and is impractical to determine the extent, nature or cause of the engineering work in the buildings which is necessary to be done, or even to ascertain whether or not it is practical to effect repairs of the premises?

Mr. Groff: I will stipulate, your Honor, that as of this time that I am standing before you, that the earth movement is continuing.

The Court: And was at the time the suit was filed?

Mr. Groff: I can stipulate as one occurrence as

to this date. I don't know what is going to happen tomorrow, nor does anybody else.

Now, as to the other matters, I don't care to stipulate, your Honor.

The Court: You do not object to the fact that he is not making claim for money at this time, are you?

Mr. Groff: If that is his theory of the complaint, and he wants to go on that theory, I won't object to it, your Honor.

The Court: What oral evidence do the plaintiffs or the defendant want to introduce in this case? [9]

Mr. Garber: I would like to have Colonel Harman take the stand.

The Court: May I ask, probably as a matter of curiosity, how close were these premises to the edge? I haven't been down there, all I know is what I have read in the papers.

Mr. Garber: These two houses, your Honor, if your Honor is familiar with the area at all, are pretty much a prolongation of the ocean through the clubhouse up the hill, and the two houses stand one above the other. I suppose they are, I imagine, some 200 or 300 feet up the hill from the clubhouse.

The landslide area extends much further up the hill. It goes up some 600 or 700 yards, I guess.

Mr. Groff: Maybe I have been reading the same things that your Honor has, and I was also involved in the Palos Verdes bluff slide, your Honor.

In the case of Portuguese Bend, I think I can

make a statement that we do not have a cliff situation.

The Court: As I understand it from what I have read—as I said before, that is all I know—there has been an earth movement there, that much of that property is gradually shifting into, you might say, the lower areas.

Mr. Groff: That is correct. There are no cliffs involved.

Mr. Garber: It is quite an amazing thing. There are a lot of carriers through California, through the Hollywood [10] Hills, and so forth, probably a hundred thousand homes built on terrain that is much more precipitous than this terrain down here.

The Court: Was this built on filled land?

Mr. Garber: No, your Honor. This is not filled land.

I know part of that slide down there, there is some of the earlier damage, and most of the severe damage is down near the beach where the slope is very modest, but the terrific mass of land from far up the maintain seems to be just a mass coming down and reaching out into some place into the ocean. It has caused a pier to buckle, for example, by the movement of the land.

The Court: Is this part of the property that they claim the building of the highway—I noticed some suits filed by reading of them in the papers—against the County of City because of excavations made that caused the land to shift?

Mr. Garber: That is the theory of the Crenshaw Boulevard area that was involved in cutting the

land loose or something like that. They triggered it in some way.

Fortunately, Mr. Groff and I don't have to battle out that legal proposition.

Mr. Groff: I have about \$3,000,000 of it to date, your Honor.

The Court: I think the policies and notice of cancellation should be marked in evidence. [11]

Mr. Garber: I would offer them in evidence.

The Clerk: Are there two policies?

Mr. Garber: There are two policies.

The Clerk: Which one do you want to mark first, or does it make any difference?

Mr. Garber: Suppose you mark the HOB first. I think that is the one I mention first in my pleadings.

The Clerk: I have marked the policy HOB 16557 as Plaintiffs' Exhibit 1, and the other policy I have marked as Plaintiffs' Exhibit 2.

What is this, counsel, a notice of cancellation?

Mr. Garber: A notice of cancellation.

The Clerk: And as Plaintiffs' Exhibit 3 the notice of cancellation.

The Court: Is that the cancellation of both policies?

Mr. Garber: Both policies. There are two cancellation notices, your Honor.

The Clerk: There are four altogether, two by Leonard F. Harman and two by Ruth V. Harman.

Are they all received in evidence, your Honor?

The Court: Yes.

The Clerk: Plaintiffs' Exhibits 1, 2 and 3 in evidence.

(The documents referred to were received in evidence and marked Plaintiffs' Exhibits Nos. 1, 2 and 3 respectively.)

Mr. Garber: Would your Honor care to have the witness [12] take the stand?

LEONARD F. HARMAN

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Leonard F. Harman; H-a-r-m-a-n.

Direct Examination

By Mr. Garber:

Q. Colonel Harman, you are one of the plaintiffs in this action, is that correct?

A. Yes, sir.

Q. We have just marked in evidence as Plaintiffs' Exhibit No. 1 an insurance policy numbered HOB 16557. Can you tell us on what premises that policy covers?

A. 666 Beachcomber Road.

Q. Can you tell us the use that is being made of 666 Beachcomber Road?

A. It is a family residence.

Q. You reside there? A. I live there.

Q. Did you build the house yourself?

A. Yes, sir.

(Testimony of Leonard F. Harman.)

Q. When?

A. In 1954 and '55, occupying it in 1955.

Q. Since completion you have occupied those premises, [13] is that correct?

A. Yes, sir.

Q. Now, Policy No. 04-500340 has been marked as Plaintiff's Exhibit No. 2 in evidence. What premises does that cover?

A. That is at 669 Sea Point Lane.

Q. Is that in the general vicinity of No. 666 Beachcomber Drive where you live?

A. It is directly below us and one lot to the west.

Q. What use is being made of No. 669?

A. We built it as an income property, and have it leased.

Q. For residential purposes?

A. For residential purposes and income.

Q. When did you build that, approximately?

A. 1956.

Q. Colonel Harman, at the time you took these two policies of insurance we have referred to, did you know anything about any unstable condition of the land in the Portuguese Bend area of Palos Verdes? A. No, sir.

Q. When did you first gain any knowledge of a landslide in that area?

A. During last October.

Q. That would be October, 1956? [14]

A. October, 1956.

Q. What brought it first to your attention?

(Testimony of Leonard F. Harman.)

A. I heard about a big crack up toward the extension of Crenshaw.

Q. Was that above where your house was?

A. A half mile above, I guess, and out of curiosity I went up to look at it.

Q. And you found a crack in the land there?

A. It was about six feet wide and running more or less east and west several hundred yards.

Q. Would that be parallel to the ocean?

A. Substantially at that point.

Q. What was the next matter of landslide that came to your attention?

A. Funny things started happening to houses, especially down on the waterfront, buckling and shifting in general on their foundations.

Q. When did you first discover the landslide affecting your property?

A. Probably the latter part of October, 1956, last year.

The Court: Just a moment. What was the first thing you noticed of the landslide affecting your property?

The Witness: A crack on the west side of the house just above the foundation, between the foundation and the plate.

The Court: Are these houses built on a plate or on a [15] wooden foundation?

The Witness: Our house, your Honor, is built on reinforced cement pilings, with a grade beam and then a reinforced foundation around it. The property at 669 Sea Point Lane is built on a slab.

(Testimony of Leonard F. Harman.)

It is reinforced heavily with anchoring pylons and a cantilever deck.

Q. (By Mr. Garber): The first damage you noticed was a crack at 666, is that correct?

A. Yes, sir.

Q. What did you do after you discovered that damage with respect to your insurance?

A. I reported it to the agent from whom I had obtained the policy.

Q. Did anything happen as a result of the report that you made to the agent?

A. Not at first. I think the second time I reported it an insurance company sent an adjuster and a contractor, two people, to examine it.

Q. When this adjuster came, did he introduce himself to you as a representative of the American Casualty Company? A. Yes, sir.

Q. Do you know his name?

A. I can't recall it at the moment. I think I have a record at home. [16]

Q. You say he was accompanied by somebody else?

A. Somebody that represented himself as a contractor.

Q. Do you recall that gentleman's name?

A. I don't remember his name. I think I have a record at home.

Q. Did they make an inspection of the premises?

A. Yes, sir.

Q. In your presence? A. Yes, sir.

(Testimony of Leonard F. Harman.)

Q. Did they see the damage which was existing at that time? A. Yes, sir.

Q. What was the damage that you pointed out to them?

A. At that time the cracks had progressed somewhat. There were cracks in other parts of the ramp coming up the garage, and cracks in the foundation in the house down below at 669.

Q. Did they make any further inspection of the premises in that area?

A. I took them on a conducted tour of the whole area, down at the waterfront and all over to houses where the damage was quite evident, some very severe damage on some houses at that time, and up on the hill so that they could see the massive earth crack and where it had taken place.

Q. Did you have any other contact with people representing [17] the American Casualty Insurance Company?

A. During the early part of December this same adjuster from the insurance company came again to inspect the premises.

Q. Colonel Harmon, I don't believe that I had you specify the date that the adjuster, accompanied by the builder, **came first to see the premises.**

A. That was, as I remember, during November.

Q. November of 1956? A. November.

Q. Did you have more contact with representatives of the American Casualty Company?

A. The same adjuster came in the early part of December and noted that the damage was con-

(Testimony of Leonard F. Harman.)

tinuing, and in the latter part of December, and an engineer representing the company came to make an inspection.

Q. That is the latter part of December?

A. Yes, it was the latter part of December.

The Court: Is there any dispute on these facts, counsel?

Mr. Groff: I think my stipulation pretty well covered this.

The Court: How much damage is there to the property now? Are you still occupying it?

The Witness: I am still occupying the home. It is being [18] occupied under, you might say, some difficult conditions. The tenants in the income property have given me notice they will vacate this month, in a few weeks.

The Court: Any more damage to the foundation of the houses?

The Witness: Oh, yes, sir. We were away for three weeks. My wife couldn't stand the cracks and listening to it and see things happening, so we had to kind of be gone as much as we can but still sort of act as caretakers. So we came back after three weeks and the cracks have extended out further west from the highway in the last three weeks. And another big piece of earth up toward Crenshaw slid down in our absence.

Q. (By Mr. Garber): Colonel Harman, have you made any attempt to obtain fire insurance on your property from any other insurance carriers?

The Court: May I ask, counsel—I notice it is

(Testimony of Leonard F. Harman.)

pleaded—what materiality is that, whether they can get fire insurance from another company or not? Is not this a question of whether you can get liability out of this policy or not?

Mr. Garber: It is, your Honor, but my thought on this is that this policy should be entirely in force and effect as to all it covers.

The Court: But whether you can get other insurance or [19] not, is that not immaterial?

Mr. Garber: I think, your Honor, that the policy is adequate. That is our position.

The Court: Either there is liability under this policy or there is not.

Mr. Garber: There would be liability for all purposes on it. That is my view.

The Court: I think the Court can almost take judicial notice that no insurance company would issue a policy such as this under present conditions.

Mr. Garber: Nor issue one for fire or windstorm or any other hazard, I believe.

The Court: There would not be any question of that, would there, counsel?

Mr. Groff: I was going to object, your Honor, in that I felt it was incompetent, irrelevant and immaterial. So my answer to your question is that, yes, it is difficult to get it there, your Honor, but I make objection to my own answer so far as establishing it as a part of the record, because I don't believe it has anything to do with this case or contributes anything to the issues.

The Court: I feel that way, too.

(Testimony of Leonard F. Harman.)

Mr. Groff: I would like to put in the objection that it is incompetent, irrelevant and immaterial.

The Court: I am going to sustain the objection, because [20] it looks to me, under both the statements of fact in this case and the pleadings, as to whether or not an insurance company, in view of imminent danger, has a right to give this notice of cancellation. I think that is the whole question.

Mr. Garber: Yes.

The Court: When the property is in imminent danger of a loss, whether that provision of the Insurance Code permitting five days' notice from an insurance company under those circumstances can cancel.

Mr. Groff: With the thought of helping the Court and in order that we have a clear position stated, this is a true statement so far as we are concerned, so long as we each understand what "cancellation" means: "Cancellation" means that the company can give this notice of cancellation. As to the effect of cancellation, that may be a different story.

We take a position that you cannot be denied a cancellation under the contract.

That is a true statement, your Honor.

The Court: Cannot be?

Mr. Groff: Cannot be denied under the statute and under the policy. I am using "cancellation" in that term.

The Court: Is it your position that when there

(Testimony of Leonard F. Harman.)

is an imminent danger there you can avoid your liability by giving a 5-day notice?

Mr. Groff: That isn't before us on these issues, your [21] Honor.

The Court: Why isn't it?

Mr. Groff: The position of this complaint, if I understand it correctly, is that if this house burned down today that the cancellation notice would be ineffective for the burning of the house.

Is that your position, counsel?

Mr. Garber: That is my position.

Mr. Groff: That I believe is the position of the complaint.

This is all we are fighting is a complaint as we are faced with it on that issue, and the substance of it, as counsel says it is.

The Court: Are you claiming that fire insurance is still in effect?

Mr. Groff: We say that cancellation is good as far as fire insurance goes.

The Court: This is one of those new gimmicks that the insurance companies have been trying out the last couple of years, is it not?

Mr. Groff: Can I take an honest position with your Honor? This is rather informal, the way we are proceeding here. I do it with the purpose of trying to assist counsel and the Court, if I may.

I am well aware of the cases which have stated that [22] where we have a named peril policy, such as a fire insurance policy—I believe Mr. Garber

(Testimony of Leonard F. Harman.)

cited some, there aren't many, just one or two or something like that—but where we have a fire and that fire commences before an expiration date, that the expiration date doesn't cut off the damages for a subsequent indemnity of fire that started before.

Now the theory of those cases I submit to this Court is one of proximate cause, your Honor, the proximate cause having commenced before the fire.

In this case we have what we call an all physical loss form. I know of no cases, your Honor—and I have tried to find some—in which the issue has been before the Court and been passed on as to the effect of that rule that we may have a proximate cause in connection with an all physical loss.

As to whether there should or shouldn't be a difference, I would like to state this, that the fire policy says we will pay for all damages proximately caused by fire, a named peril.

The APL—all physical loss, if I may use that term; "APL" is what it is known in the business—that is, I believe if I can paraphrase it, that we will pay for all physical loss to the object occurring within the term, the term of the policy being the inception to the expiration date or, as some courts have indicated, inception to date cancelled constituting the term.

I know of no law, I can't say that there is, but I suggest [23] that to you, that there is a difference in coverage.

(Testimony of Leonard F. Harman.)

The Court: Haven't we a rather unique situation here as far as the law is concerned?

Mr. Groff: Yes. And I would say this, that I don't think that you can consider them necessarily both together, in that the broad character of an all physical loss, where you say that damage occurs to this within the term of the policy, that this damage does not have to be triggered by an incident which will be a proximate cause factor that will start and stop. You may have a continuance. It may go on for 15 years.

Projecting this theory of continued liability in instances such as Portuguese Bend, where the Government made a survey in 1922 and another in 1942, and found the condition where there have been houses and areas which have moved for years, now you would write a policy in perpetuity because of the different character of the policy, because of the APL and a named peril fixed incident such as fire which starts in the normal course of human events.

I state that to your Honor only on this basis, that we are before this Court only because it is the position of the plaintiffs, as stated by Mr. Garber, that we may not terminate any liability whatsoever under the policy, that if it burned tomorrow the cancellation is ineffective and we would have to pay for the burning of the building.

That is the only issue that we have to face in this [24] particular lawsuit, and that is the issue that we do face.

The Court: Do you mean to say that if this

(Testimony of Leonard F. Harman.)

property is physically destroyed by something, the earth slide, you are still liable?

Mr. Groff: May I talk outside these pleadings, your honor?

I would say that if that was the issue that we were faced in the pleadings to this complaint originally, my company would have instructed me, if that was the only issue, to say that we were liable for landslide damage starting before the cancellation and continuing as one occurrence into the future beyond the cancellation date. I believe that is what my client would have instructed me to answer.

And counsel has said that that is not the issue in this case.

The Court: I understand the issue to be that counsel is not raising the question of the fire loss that possibly may occur, but it is on account of this special provision of physical loss by reason of this slipping of the earth because it commenced prior to the date of cancellation, and part of the damage had occurred at that time when he called your representatives in to examine the loss.

Mr. Groff: Let me make this general statement: We admit without reservation all loss and damage to February 4, 1957. If I may just get rid of that to start with. That was the date [25] of cancellation.

Secondly, and maybe I misunderstood counsel when I asked him, your Honor, but do I understand, Mr. Garber, that the position of the plaintiffs and do

(Testimony of Leonard F. Harman.)

I understand the pleadings correctly that it is the position of the plaintiffs and the pleadings that we cannot cancel for any purpose whatsoever?

Mr. Garber: Yes, that is the basic pleading.

The basic pleading, of course, was brought to counter the immediate active peril which was then presently confronting the premises on account of the land slipping.

The Court: I might say, if any fire loss occurred there it probably could be sued for under their notice of cancellation, but I think that under the peril having an immediate peril existing there at the time on account of slippage that they would be liable for—I am not making any ruling on this; I am just talking out loud—that the company would be liable for that loss that occurred. If the property is destroyed by reason of that slippage, then the value of those improvements they would be liable for.

Now, where do you and I differ, counsel?

Mr. Groff: We don't differ, your Honor. I take exception to your Honor's statement only in the fact that part of that isn't before this Court at this time. The only thing before us is whether the company can cancel as a total thing.

The Court: It seems to me that it is a difference without [26] a real difference existing between you under your statement. I assume that anybody can get insurance up there for fire loss, I do not know. Probably your company would insure for fire loss right now.

(Testimony of Leonard F. Harman.)

Mr. Garber: I was just going to examine the witness on that subject, your Honor.

The Court: I know, but if it was a straight fire insurance and conditions existed where they could have canceled out the fire insurance, there is no question about it. But it is this special physical damage rider—I do not know whether it is a rider or not; I have not examined the policy—but it is a new provision that has been provided for insurance agents and that they are using now to sell insurance by. That is the issue in this case.

Now it seems to me that if the company recognizes any loss that may occur by reason of this physical damage clause, why, you haven't anything to quarrel about.

Mr. Garber: By "physical damage" you are referring to the landslide?

The Court: Yes. That is the physical damage. The only trouble with you is that the earth did not move fast enough.

Mr. Garber: The situation still confronts this assured that he has two valuable pieces of property in which he has invested substantial amounts of money and he bought insurance to cover them. [27]

Now, the land started to slide and it has done substantial damage so far, and it may do a great deal more damage in the future. But that doesn't obviate the fact that his property might burn today, or tomorrow, or next month, or that an airplane might fall upon his property, or that a windstorm would come along and destroy it.

(Testimony of Leonard F. Harman.)

Now he is not able at the present time to obtain insurance on the other coverages in the policy. I was going to introduce evidence that he tried to obtain other insurance.

The Court: I know, but whether he can obtain fire insurance in other companies has nothing to do with this case. If no insurance company would have issued a fire insurance policy when he built the houses, he wouldn't have had any coverage either.

Mr. Garber: I certainly agree with your Honor on that point, and I am not criticizing any company which does not at this time take on a fire policy, because it is acknowledged underwriting practice not to.

The Court: I know, but he has no imminent peril from fire at this time.

The way I look at this, what little I have heard and read about this case, is that there may be a serious question whether there is an imminent peril and some damage already done by the slide there, and it looks like a continuous affair, that the property eventually would be destroyed by reason [28] of that, that the company might be held liable under that.

But under a provision of the policy for fire I do not see why the company could not cancel that provision.

Mr. Garber: The only reason, your Honor, is that fire insurance is unobtainable on the premises, or any other premises down there, due to the landslide. That is one of the damages. The landslide is

(Testimony of Leonard F. Harman.)

the physical damage or the destruction which it is doing to the houses.

A collateral effect is that it has made these houses not good insurance protection for fire or windstorm or damage by aircraft or any of the other hazards commonly insured against, the reason being this, that underwriters have found that it is not good practice to write fire insurance—just to use one example—upon property where it would be to the economic advantage of the owner to have the property destroyed.

Now that is just a degree of carefulness. Of course you can't be stronger than that. That is good insurance practice, that if you are going to write insurance you write it on a piece of property that the man would rather have intact than he would have it destroyed. That is a basic tenant in the underwriting of insurance.

We are confronted with this situation, that Colonel Harman has two properties there and he probably would be economically benefited if he had fire insurance and those houses [29] were to burn. He wouldn't be subjected in this case to the slow glacial destruction of the houses by landslide.

That being the situation, no company will come forward and write fire insurance on his house or anybody else's house. That is not a reflection on Colonel Harman, it is a recognition of an underwriting principle which has come into effect for one reason only, and that is the landslides, and the insurability of those houses down there is just as

(Testimony of Leonard F. Harman.)

direct and ascertainable as a result of this landslide as the twisting of roofs and the upending of houses and all of the other damages which is available and visible to the eye. You can go to insurance agents and inquire and say, "I would like to have insurance," and they will say, "You can't have it."

The Court: May I ask you the question: Could the court hold that one provision of the policy is good, the cancellation is good for one part of the policy, and not for the other?

Mr. Garber: I would think it would be a strained construction, your Honor, very strained.

Mr. Groff: May I say something?

The Court: Yes.

Mr. Groff: As I understand the cases, your Honor, there is nothing inconsistent with a holding of the court that the cancellation is good. Now if the philosophy of imminent peril applies here, that is an entirely different philosophy. [30]

Under the fire cases it says that since proximate cause of this thing commenced before the cancellation or expiration date that the loss came within the term of the policy. This seems like a very consistent position to me. The cancellation is good. The loss is within the term because it commenced before the term.

The Court: Then do I understand that really what you people are quarreling about here is the cancellation of the fire clause?

Mr. Groff: We take a position that the cancellation is good, your Honor, for all purposes. We state

(Testimony of Leonard F. Harman.)

and recognize that there is a doctrine of imminent peril in connection with liability for damage that commenced before the termination of insurance. I don't think that is what the plaintiff has asked us to meet in this lawsuit.

The plaintiff has gone, if I may put it this way, he has "gone for broke," he has asked for everything. That is the issue we have met.

But I will state to your Honor, that the doctrine of imminent peril exists but it is not a cancellation doctrine, it is a doctrine of liability for companies.

The Court: Then it is your position that if this property should be completely destroyed by that slide down there that you are still liable?

Mr. Groff: May I speak about my personal position and [31] the position of my company, your Honor, not as an insurer in this case? Yes, as long as it is one occurrence. So long as it is one occurrence.

Mr. Garber: Pardon me. This is not clear to me, the distinction between personal and the other.

Mr. Groff: It is not an issue. I take objection to it because it is not an issue in this lawsuit, your Honor.

The Court: Of course the issue is the cancellation of the whole policy.

Mr. Groff: That is right.

Mr. Garber: I think probably I should state at this time, your Honor, just a bit of the history which I can adduce from the witness if the court cares to

(Testimony of Leonard F. Harman.)

have me do it, but I can probably state it myself more briefly.

This matter started out as a cancellation to have been effective about December 19th or December 29th of all further damage from landslide. There was a request made of Colonel Harman and his wife to sign endorsements to the policy which would terminate the insurer's liability for landslide as of December 27th.

Mr. Groff: Your Honor, I object to that. I prefer to have the witness testify, if it is going to be a part of the record, as to what happened.

Mr. Garber: Very well.

Mr. Groff: I will make an opening statement to the court. [32] There was a letter of endorsement sent, your Honor. I believe those speak for themselves. If we are going to have evidence on it, I believe that is the evidence that should go in.

The Court: The only thing is, it seems to me that you people are not very far apart on this thing.

Mr. Groff: May I talk to counsel, your Honor?

The Court: Yes.

(Conference between counsel.)

Mr. Garber: Your Honor, could I get some evidence from the witness on this point?

The Court: Yes.

Q. (By Mr. Garber): Colonel Harman, did you receive from the American Casualty Company some endorsements to the two policies we have been referring to with the request that you sign them?

(Testimony of Leonard F. Harman.)

A. Yes, sir.

Q. I do not have those with me, but I have another endorsement that you received as an accompaniment to a letter dated in January, 1957. Do you recall if those endorsements were similar or not?

A. Yes, sir.

Q. Did the first endorsement which was offered you say, in substance or effect——

The Court: Does not the endorsement speak for itself?

Mr. Garber: It does, your Honor, except that I don't [33] happen to have the original ones here.

The Court: Show it to counsel. Maybe he can stipulate to it.

Mr. Groff: I have stipulated it may go in evidence. It was sent by the company, duly executed, and it may go in evidence.

Q. (By Mr. Garber): Colonel Harman, did you receive a letter from Rathbone, Kind & Seeley dated January 14, 1957? A. Yes, sir.

Q. And there were attached to that some endorsements? A. Yes, sir.

Q. And they are similar in effect to those previously shown to you? A. Yes, sir.

Mr. Garber: I would like to offer this in evidence as Plaintiffs' Exhibit No. 4, I believe.

The Clerk: In evidence, your Honor?

The Court: Admitted.

The Clerk: Plaintiffs' Exhibit No. 4.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 4.)

(Testimony of Leonard F. Harman.)

Mr. Garber: I wonder if your Honor would care to examine those before I continue. They are the two slips at the bottom of the letter. [34]

The Court: You may proceed.

Q. (By Mr. Garber): Now, Colonel Harman, when you received the first endorsements that I have referred to, which we do not have copies of here, what action did you take?

A. I contacted two insurance agencies in San Pedro to see if insurance was available.

Q. You say you contacted—

Mr. Groff: I will object to that as incompetent, irrelevant and immaterial, move that the answer be stricken, in that it doesn't tend to prove or disprove any of the issues here.

The Court: What difference does it make? There is no jury present, counsel.

Mr. Groff: All right. I do object, your Honor.

The Court: I do not think it is material, as far as that is concerned.

Q. (By Mr. Garber): Colonel Harman, what did you do? You mentioned you went to see somebody at San Pedro. State what you did.

The Court: I think that objection is good on that.

Mr. Garber: Your Honor, I believe that that is an issue that we have in this case under paragraph 13 of our complaint.

The Court: I know you made that allegation in your [35] complaint, but I think it is a question of either they have a right to cancel this policy or not.

(Testimony of Leonard F. Harman.)

Mr. Garber: I would agree with your Honor, if I understand it correctly, and that is if the policy is not canceled it is totally in effect and it is in effect as far as falling aircraft is concerned, as far as fire insurance is concerned, as far as windstorm damage is concerned and as far as any of the other hazards are concerned.

That is the position which I think is correct, that we have a policy which is indivisible, that there is an existing peril, hostile destruction forces at work, or one of them, and that is the landslide. Therefore the policy must remain in the status quo while this hazard exists, and the status quo includes not only the policies covering against landslide, the status quo also embraces within it the other elements of danger which are covered in this policy.

The Court: That is one of the principal issues in the case.

Mr. Garber: Yes, I believe it is, your Honor.

And it is rather a novel issue as far as previous decisions of courts are concerned, because we have in the past, particularly in the field of fire insurance, dealt generally with one destructive force and not with several, although there are some parallels in the cases.

The Court: They are covering now everything but automobile [36] damage, are they not?

Mr. Garber: Yes, they are. As a matter of fact, the policies are a vast improvement, and I think the companies who developed them deserve kudos be-

(Testimony of Leonard F. Harman.)

cause, after all, what an assurer is looking for when he buys insurance is not a guess on what is going to destroy his property, but he wants to be assured that if it is destroyed he will be refunded the value of the perils insured against it.

The only point of this line of this line of testimony was to establish factually the tie-in.

The Court: I do not think it makes any difference whether he can get insurance from some other company or not in this case. This is the only policy that the defendant is involved in. And whether any other company would accept the risk or not, I do not see that it is material to this case, or any part of the risk.

Mr. Garber: If the policy should be in effect then he should be able to rely on the one premium which he has paid for this policy and that should see him through.

The Court: Does that not bring us down more or less to this question, whether a cancellation or any imminent peril is in view or in prospect, whether only the peril that is in prospect can still exist?

Mr. Garber: That is the key of it.

The Court: I presume that the Colonel here is principally [37] interested right now in the earth slide, he is not worrying about a fire burning up his house.

Mr. Garber: We had quite a debate when we got these endorsements as to what to do because most people don't want to be without fire insurance, and that is one of the main motivations in buying the

(Testimony of Leonard F. Harman.)

policy, and he didn't know anything about a landslide at that time.

The Court: Right now I think he is worrying about landslides.

Mr. Garber: But I would think in an all physical risk policy, if you had a fire that started in one side of the building and an airplane hit the other side of the building, that both of those are covered, and a landslide starting at the same time that also is covered, and there is no termination of the policy until the last one of those destructive forces is gone.

The Court: That is one of the questions I am going to have you gentlemen brief. I want to say right now that I am not going to decide this case this afternoon. This represents a rather novel point to me.

Mr. Garber: It does. I have always heard about issues that were de novo and I believe that this one is.

The Court: Any further questions of this witness?

Mr. Garber: I have no further questions.

The Court: Do you have any questions? [38]

Mr. Groff: Yes, your Honor.

Your Honor, may I make inquiry as to that exhibit number, the last one that went in?

The Clerk: Plaintiffs' Exhibit No. 4.

(Testimony of Leonard F. Harman.)

Cross-Examination

By Mr. Groff:

Q. Mr. Harman, Exhibit No. 4, you received that, didn't you? A. Yes, sir.

Q. And you read it, didn't you?

A. Yes, sir.

Q. I would like to call your particular attention to the second paragraph which reads:

“It would be quite obvious that we would be in no position to change anything which has occurred prior to the date on which such limitation is made in the policies.”

Now, you recall reading that portion also, don't you? A. Yes.

Q. Now, Colonel, you did not understand by the whole of that letter and by that paragraph that the company would not pay you for landslide damage, did you? A. (Pause.)

Q. I know the Colonel doesn't hear too well.

Did you hear me? [39]

A. Yes, but I don't understand the meaning of that.

When they send something like this, whatever that says, when they send this endorsement for me to sign and requesting that I sign that endorsement I would have no coverage for the landslide that was then taking place.

The Court: Isn't that quite obvious from the letter, counsel, what is meant?

(Testimony of Leonard F. Harman.)

Mr. Groff: I don't think it is, your Honor.

The Court: The way I read that letter——

Mr. Groff: This wasn't the position taken by the company and the letter is unfortunately written, but it was not the position taken by the company before the lawsuit was filed.

The Court: Certainly a casual reading of this letter indicates that they are willing to carry the fire loss if he waives his landslide loss.

Q. (By Mr. Groff): Colonel Harman, after you received that letter did you make any further inquiry of the company or any representative as to the meaning of the second paragraph of that letter, or the endorsement, before you filed suit?

A. No, sir. I lost no time in contacting competent people to advise me in such a serious matter as all my life's savings tied up in two houses. It was a very serious matter. I had no time to look around or fuss with the words that they [40] sent.

Q. At any time did anyone connected with the company, excluding this letter for whatever it says, did they ever tell you that they would not pay you for the landslide damage which had occurred and which continued after the cancellation date?

A. Why, yes, by their actions.

Q. You are speaking of the Exhibit 4 that is in front of you, is that correct?

A. I am speaking of this (indicating) and I am speaking of the cancellation notices.

Q. There were no other actions by the company

(Testimony of Leonard F. Harman.)

by which they stated to you they would not pay for the landslide damage, is that correct?

A. They just handed me a knife to hurt myself but they didn't jab it into me.

Q. The form of the question may be unfortunate. Let me restate it.

The Court: Let me ask him this: At any time did you receive any communication from the company or a representative, outside of these letters, relative to the cancellation of this one provision? When you received that letter did you ever talk to anybody connected with the company?

The Witness: No, only my lawyer.

The Court: Only your lawyer? [41]

The Witness: My attorney. I thought it had gone by my ability to handle it.

Q. (By Mr. Groff): Then, outside of the cancellation notice in this letter, there were no other communications, written or oral, from the company that indicated to you that they would not pay for the landslide damage, is that correct?

A. That is correct.

Mr. Groff: I have no further questions.

The Court: I think that is all.

(Witness excused.)

The Court: Any other witness?

Mr. Garber: May I be sworn, your Honor?

LYMAN A. GARBER

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Lyman A. Garber.

Direct Examination

The Witness: I am the attorney for the plaintiffs herein.

On or about January 21, 1957—

Mr. Groff: Your Honor, I think at this time I am going to object unless there is some kind of foundation. This is a bit unusual, I believe, your Honor. [42]

The Court: It may be unusual, but let us hear what he has to say.

Mr. Groff: Subject to my objection, your Honor?

The Court: Yes.

The Witness: On or about January 21, 1957, I telephoned a Mr. Wright, whom I had been informed by the agent was the assistant manager of Rathbone, King & Seely, the general agents for the defendant company, and he told me that it was necessary for them to terminate the coverage on landslides, that that was too expensive for them, but they were willing to stay on the fire.

Subject to that, some three or four days later, I went to the offices of Rathbone, King & Seeley and I saw Mr. Walker, and discussed with him the proposition and clearly understood—

(Testimony of Lyman A. Garber.)

The Court: It is not a question of what you understood. What was said? What your understanding is, is a matter for us to say.

The Witness: He said that as far as he knew the company would not continue on the policy if they had to pay for future landslide damage and that they would endorse the policy either to terminate the landslide damage or would have to get off of it. And that was the best of his knowledge on the situation.

I have no further questions.

The Court: Any questions, counsel? [42-A]

Cross-Examination

By Mr. Groff:

Q. Mr. Garber, what date was it that you stated that you went to see the company?

The Court: He said on or about January 21st of this year.

Q. (By Mr. Groff): At that time, Mr. Garber, what you discussed with him was whether the company was interested in buying the two houses, wasn't it?

A. No. This was a telephone conversation with Mr. Wright on January 21st.

Q. Then you stated you went to see Mr. Walker.

A. Yes.

Q. When did you see Mr. Walker?

A. Two or three days later, I believe.

Q. You went on——

(Testimony of Lyman A. Garber.)

A. The 23rd of January.

Q. And you went to see Mr. Walker following a letter that you wrote to him in connection with a proposal whereby the company would buy the houses from Colonel Harman?

A. Yes, I may have discussed that with him at that time.

Was that letter dated before then? I have forgotten. That was a letter in which I was pointing out a means of [43] salvage to the company.

Q. Yes. I show you this letter dated January 22nd. A. (Examining exhibit): Yes.

Q. That, Mr. Garber, was substantially what you went to see Mr. Walker about on the 23rd, wasn't it?

A. My office is in Beverly Hills, and I was downtown, and I was interested in the case, and I dropped in to see Mr. Wright or anybody else, and Mr. Walker was the only executive present.

Q. The matters contained in this letter are substantially what you discussed with him?

A. Yes, I discussed that with him, I believe.

Mr. Groff: I wonder if I may introduce that, your Honor?

The Clerk: Defendant's Exhibit A.

(The document referred to was received in evidence and marked Defendant's Exhibit A.)

Mr. Groff: I have no further questions.

The Court: That is all.

(Witness excused.)

The Court: Call your next witness.

Mr. Garber: We have no further witnesses, your Honor. The plaintiffs rest.

Mr. Groff: Your Honor, we have but one witness and I offer either the statement as to what the witness would testify to, or the witness himself, just to see if we can shorten [44] this matter.

The witness is Mr. Metcalf. He examined the place about January 26th, and at that time made an inspection, and his estimate as to the damage at that time to the building at 666 Beachcomber Road was \$4,500 to \$6,000 and at 669 Sea Point Lane approximately \$2,000.

I would like to do it this way and ask counsel whether he cares to make such a stipulation that he would so testify.

The Court: That he would so testify?

Mr. Garber: I will so stipulate, your Honor.

Mr. Groff: The defendant rests, your Honor.

The Court: Gentlemen, this case is going to have to be briefed. You just started your troubles and my troubles will start when I get your briefs.

I might say that there ought to be a way that this matter can be solved between you, because your statements here have indicated that the only real difference is that of the carrying of the fire loss.

Mr. Groff: That is substantially correct, but with your Honor's permission may I state it differently?

Our position is that so far as landslide liability is concerned, so long as it is a continuing occurrence,

it is not affected by the cancellation. If I may put it that way, your Honor, I will agree.

The Court: I am taking just the two features of the [45] policy that the parties seem to be concerned about. First is fire and landslide damage, and that has already commenced, it is already in progress.

Mr. Groff: I think a better statement, if I may say so to the court, is that it is liability arising out of landslide and all other liability from any other cause. I think that is a truer statement of counsel's position, your Honor.

Is that not true?

Mr. Garber: Yes. I think the court is probably using "fire" as a generic term, but it covers wind-storm and all of the things which are not currently happening.

Mr. Groff: That is our position, your Honor.

The Court: And of course your position is that the landslide having commenced, if the landslide destroys the property, you are still liable? Is that not your position?

Mr. Groff: Your Honor, I am going to give you a square answer if I can have two seconds with my client.

(Conference between counsel and client.)

The Court: You can answer that yes or no. I just want to know your position.

Mr. Groff: On these pleadings, no.

The Court: On the pleadings, no?

Mr. Groff: On these pleadings, no.

The Court: They can always be amended to conform to facts. [46]

Mr. Groff: Then we would have admitted it if we had been served with such pleadings, we could have admitted that when we came in.

The Court: As we try it now, what are the facts?

Mr. Groff: I have only advised my client in connection with these pleadings. Mr. Walker and myself are inclined to do that at the present time.

If I may have a half an hour I can call his superior and ask him, your Honor. I don't feel that it is something I should stipulate to in open court without direct authority.

The Court: We cannot take a recess until you communicate with the head office every time a question comes up, counsel, so I will not ask for it.

You do claim that all other losses have been cancelled out?

Mr. Groff: I do claim that, and I am neutral, if I can it this way, at this point, and I will advise counsel and your Honor by letter as soon as I can communicate with them.

The Court: I do not know anything about this company, whether it is a big company or not, but it seems to me that shenanigans of some kind are going on where a matter like this cannot be adjusted.

Mr. Groff: Had you planned to recess now, your Honor?

The Court: I am planning on going home pretty soon. I will take it up tomorrow morning. [47]

Mr. Groff: Maybe we can save ourselves some

time. We will admit to the entry of judgment, your Honor, on proper pleadings: (1) That there was a cancellation as of February 4, 1957, of the whole of each of the policies; (2) that that cancellation does not affect the liability of the defendant for damage by a landslide commenced before February 4, 1957, and continuing after that date as one occurrence.

The Court: What does counsel have to say about that?

Mr. Garber: That covers one point, your Honor, the situation with respect to the landslide, but I am afraid the use of the word "cancellation" in there would be destructive of plaintiffs' position because cancellation would mean——

The Court: I do not think the language he used conveys his full meaning, that the policy was cancelled but there is a liability before the cancellation that had commenced and is a continuing liability until that present condition ceases.

Mr. Garber: Your Honor, I do not believe that cancellation is something which is possible at this stage of the proceedings, or where they were when the notices were served.

The Court: You know, counsel, half a loaf is better than no loaf.

Mr. Garber: Your Honor, we had to make this decision, as to whether we should have fire insurance and no landslide insurance or whether we would try to keep the landslide insurance which was the present risk, to keep that applicable. [48]

The Court: That is your imminent danger right now. That is the real worry of the parties.

Mr. Garber: Well, it is, but we have no guarantee against other casualties not occurring.

The Court: You have no guarantee you will be here tomorrow either.

Mr. Garber: No. But we haven't paid a premium on that.

The Court: It seems to me that you are close enough together that you ought to be able to work this out. We have so few cases involving fire insurance companies that most of their losses are recognized. We do not have more than probably half a dozen cases in the whole District in a year that I know of. And they could not write any insurance unless they paid losses, people just would not buy insurance, and they seem to think they have a bad risk in this case, which no doubt is true.

Mr. Garber: Before I started practicing law I was a special agent for the Great American Fire Insurance Company, and I am well aware, and really have my heart very much in this case because of my respect for the fire insurance companies and the standards which they generally adhere to, and their meticulous obligations of their liability.

The Court: Have you people discussed this together and tried to get it straightened out?

Mr. Garber: Yes, we have, your Honor.

Mr. Groff: May I, with counsel's permission, state to you—

The Court: I might say to both of you that I am very [49] much in sympathy with the plaintiffs' position in this case.

Mr. Groff: We have already so stated to counsel on previous occasions, your Honor.

The Court: What is that?

Mr. Groff: We have stated our position to counsel on previous occasions.

The Court: You do not feel that further discussion would be of any value? Both of you are in this position, that you may get a whole loaf or you may not get any loaf, and I will include both of you. I am saying that because I do not know too much about it. I just got this file and had merely a chance to glance through it and haven't had the occasion to do any researching on the subject. But I can see you have a problem on your hands, both of you have, and so has the colonel here a problem on his hands.

Mr. Groff: Your Honor, we have stated our position. If counsel has anything he wishes to state here, I realize that it might take time for him to discuss it with his client, but we are certainly going to listen to him. We have gone forward and stated our position.

Mr. Garber: Our position I think is quite simple.

The Court: You want everything for nothing.

Mr. Garber: That is our position.

The Court: That is your position, everything or nothing.

Mr. Garber: We can't afford to take a gamble on, say, [50] the remaining \$30,000 or \$35,000 in these houses going up in smoke, and they could very well go up in smoke. The only fire protection is a

county road which is closed, and I don't know if they could get a fire engine up the hill. It is a real hazard, and it would be very difficult if we did have a fire there to make any major part of our recovery out of the land damage at this time.

The Court: How long do you want to brief this case? I will give you 30 and 30.

Mr. Goff: If counsel can get his in in 30 days I can get mine in.

The Court: Simultaneous briefs will be due in 30 days.

Mr. Garber: We can make it quicker, if possible. The reason I say that is because I will certainly advance to the limit of my ability any date because of the anxiety of these parties to have this matter clarified.

The Court: If you have a fire loss in the meantime you will have another lawsuit.

Mr. Garber: 15 or 20 days would suit me if it would suit counsel.

The Court: The only thing is, you must remember after you get your briefs in I have to do some work too, and I have some briefs ahead of you now.

Mr. Groff: If that is a factor in your Honor's getting to ours, I would appreciate the 30 days, your Honor. [51]

The Court: 30 days simultaneous briefs. Then at the end if either one of you wants to answer the other's brief and will make a request I will probably give you a few days to do that.

Mr. Garber: Thank you, your Honor.

(Whereupon, at 3:25 o'clock p.m., court was adjourned.) [52]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 14th day of June, A.D. 1957.

/s/ AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed December 19, 1957. [53]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 148, inclusive, containing the original:

Petition for Removal.

Copy of all Processes, etc., served upon Defendant.

Notice of Filing Petition for Removal of Cause.

Notice of Motion for Summary Judgment, filed 2/20/57.

Motion for Summary Judgment, filed 2/20/57.

Memorandum of Points and Authorities in Support of Motion for Summary Judgment.

Proposed Findings of Fact, etc.

Proposed Judgment.

Supplementary Affidavit of J. H. Walker in Support of Motion for Summary Judgment.

First Amended Complaint, filed 3/6/57.

Plaintiff's Points and Authorities supporting Summary Judgment for Plaintiffs, etc.

Statement of Genuine Issues.

Minute Order—3/11/57.

Notice of Motion and Motion for Summary Judgment, filed 4/2/57.

Notice of Motion for Summary Judgment for Plaintiffs, etc., filed 4/5/57.

Statement of Genuine Issues.

Minute Order—4/15/57.

Answer to First Amended Complaint.

Minute Order—6/11/57.

Stipulation by Plaintiffs Re Issues for Trial.

Notice of Motion and Motion to Vacate Submission for Offer of Proof and Order.

Minute Order—7/15/57.

Stipulation to Vacate Submission for Offer of Proof and Order.

Minute Order, 9/4/57 and 10/14/57.

Stipulation re: correction Reporter's Transcript.

Opinion of Court.

Findings of Fact, Conclusions of Law and Declaratory Judgment.

Notice of Appeal.

Designation of Contents of Record on Appeal.

B. Plaintiff's Exhibit 1, 2, 3 and 4.

Defendant's Exhibit A.

C. One volume of Reporter's Official Transcript for proceedings had on: June 11, 1957.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60 has been paid by appellant.

Dated: December 30, 1957.

[Seal] JOHN A. CHILDRESS,
 Clerk;

By /s/ WM. A. WHITE,
 Deputy Clerk.

[Endorsed]: No. 15849. United States Court of Appeals for the Ninth Circuit. American Casualty Company of Reading, Pennsylvania, Appellant, vs. Leonard F. Harman and Ruth V. Harman, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 31, 1957.

Docketed: January 15, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15849

AMERICAN CASUALTY COMPANY OF READ-
ING, PENNSYLVANIA, a corporation,

Appellant,

vs.

LEONARD F. HARMAN and RUTH V. HAR-
MAN,

Appellees.

STATEMENT OF POINTS

I.

A concise statement of the points on which appellant intends to rely on this appeal is as follows:

1. Insufficiency of the evidence to support the findings of fact.
2. Inconsistency between the several findings of fact.
3. Failure to find upon material issues.
4. Making of alleged findings of fact upon matters beyond the issues and beyond the powers of the Court.
5. Ambiguity and uncertainty in the findings of fact.
6. Insufficiency of the findings of fact to support the conclusions of law and the judgment.

7. Inconsistency between the several conclusions of law, and between the conclusions of law and the findings of fact.

8. Making of alleged conclusions of law upon matters beyond the issues and beyond the powers of the Court.

9. Ambiguity and uncertainty in the conclusions of law.

10. Failure to state separately or to properly distinguish between findings of fact and conclusions of law.

11. Errors of law in the conclusions of law.

12. Error in rendering judgment in favor of appellees and against appellant.

13. Errors of law in the judgment.

14. Inconsistency between the several parts of the judgment, and between the judgment and the conclusions of law and findings of fact.

15. Ambiguity and uncertainty in the judgment.

16. Adjudication of matters beyond the issues and beyond the powers of the Court.

Dated: San Francisco, 18 February, 1958.

BOLTON & GROFF,
LONG & LEVIT,

By /s/ BERT W. LEVIT,
Attorneys for Appellant.

[Endorsed]: Filed February 19, 1958.

